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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-358

NATIONAL MARITIME UNION OF AMERICA, AFL-CIO,

Petitioner,

v.

COMMERCE TANKERS CORPORATION,

and

VANTAGE STEAMSHIP CORPORATION,

Respondents.

On a Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR RESPONDENT VANTAGE STEAMSHIP CORPORATION IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeals is reported at 553 F.2d 793 (2d Cir. 1977). The opinion of the District Court is reported at 411 F.Supp. 1224 (S.D.N.Y. 1976). The opinions are reproduced in the Petition for a Writ of Certiorari (App. A and D).

Jurisdiction

The jurisdictional requisites are set forth in the Petition.

Question Presented

Did the Court below err in holding that the execution of the "restraint-on-transfer" clause and the union's determined efforts to enforce it, rather than the district court's erroneous injunction, were the proximate cause of the injury to Vantage, thus entitling Vantage to full recovery of damages for violation of the federal anti-trust laws?

Statutory Provisions Involved

The relevant statutory provisions are cited and quoted in the Petition.*

Statement of the Case

For a general statement of the facts upon which this case arises, Respondent respectfully refers the Court to its Statement of the Case appearing in the Petition for a Writ of Certiorari filed in *Commerce Tankers Corp., et al.* v. *National Maritime Union,* Docket No. 77-376. Insofar as relates to the instant petition, the relevant facts are as follows.

1. Background

Union representation among unlicensed seamen in the American merchant marine is divided, for the most part, between the National Maritime Union ("NMU") and the

* The correct citation for Clayton Act, §4 is 15 U.S.C. §15.

Seafarers International Union ("SIU"). Each represents the unlicensed seamen employed on approximately one-half of the American flag vessels. Existing federal labor law, in the form of the National Labor Relations Board ("NLRB") "fleetwide rule" [*Moore-McCormack Lines, Inc.,* 139 NLRB 796 (1962)], as a general rule, mandates a single union as representative on all ships owned by a single owner. Pursuant to this rule, labor contracts commonly contain clauses extending recognition to after-acquired vessels.

Because of the "accretion" of vessels to the fleets and, consequently, to the labor contracts of the new owners, a "restraint-on-transfer"* clause was included by the NMU in its multi-employer collective bargaining agreement in 1969. Commerce Tankers Corporation ("Commerce") was a party to this contract. That clause prohibited the sale of an NMU-contracted vessel unless the purchaser accepted the NMU as the representative of the unlicensed seamen employed aboard the ship and adopted the NMU collective bargaining agreement. The inherent difficulty with such clause was that it disabled roughly one-half of the American merchant marine—those companies with SIU-represented seamen—from purchasing ships under contract with the NMU, since these companies were contractually and legally required to continue their recognition of the SIU.**

* This clause, sometimes referred to as the "sale and transfer" clause, is quoted in full in the opinion of the Court of Appeals (Petition, App. A, p. 5a).

** The courts below did not reach the question of whether the restraint-on-transfer clause itself was a *per se* violation of the anti-trust laws. Judge Lumbard, concurring in part and dissenting in part, did find that the record amply supported such a finding (Petition, App. A, pp. 19a-24a). For purposes of resolving this petition, it must be assumed that the clause which gives rise to the litigation is a group boycott and, therefore, an anti-trust violation.

2. NMU Implements Restraint-on-Transfer Clause to Frustrate Sale

On December 23, 1970, Vantage Steamship Corporation ("Vantage") contracted to purchase the S.S. BARBARA from Commerce for $2,750,000. In reliance on this contract, Vantage chartered the ship to the Standard Oil Company of California ("SoCal") for a period of one year, commencing in March. Since Vantage had a collective bargaining agreement with the SIU—and was subject to the legal and contractual disabilities described above—it could not agree to recognize the NMU and apply the other terms of that union's labor agreement to unlicensed seamen that would be hired in the future to man the S.S. BARBARA.

Immediately thereafter, the NMU set upon its rigid and uncompromising course of implementing its restraint-on-transfer clause. Under its collective bargaining agreement with Commerce, it had two alternative potential means for enforcing its illegal restriction. First, it could strike Commerce, since the restraint-on-transfer clause specifically provided that the "no strike" clause of the collective bargaining agreement did not apply if the clause itself were violated. Obviously, such alternative was unattractive to the NMU since the S.S. BARBARA was Commerce's last remaining vessel and there would have been no other vessels to strike.* Second, and, under the circumstances of this case more coercively, the NMU could—and did—enforce its

* In its Petition for Certiorari, the NMU places great emphasis on its decision to forego the strike and the picket line in favor of utilization of arbitral and judicial machinery to enforce the clause. However, the NMU's unrelenting actions to enforce its boycott demonstrate, we believe, that its decision not to strike was dictated by the unusual circumstances of the situation—not as the NMU claims by its desire to "foster . . . recourse to orderly adjudication, rather than coercive self-help" (see Petition, p. 12).

illegal restrictions by use of the contractual arbitral machinery.

On February 8, 1971, a labor arbitration was held between the NMU and Commerce pursuant to the NMU collective bargaining agreement. The arbitrator, who had been jointly designated by the NMU and the NMU-contracted ship owners to enforce their agreement, did what the agreement required and enjoined the sale and transfer of the vessel to any company which could not or would not accept the NMU labor contract. Vantage was not a party to the labor arbitration and the arbitrator specifically disavowed consideration of the legality of the restraint-on-transfer clause. The arbitration lasted only some 20 minutes, there was no testimony of witnesses or other evidence submitted, no briefs were prepared, and the arbitrator issued a two-page decision the same day.

The very next day, the NMU began an action against Commerce in the United States District Court for the Southern District of New York for confirmation of the arbitration award and obtained a temporary restraining order, on posting a $10,000 bond, enjoining the sale. Throughout this time, the NMU consistently avoided seeking any legal interpretation of the validity of the clause or the true extent of its legal rights.* Rather, it invoked its contractual enforcement procedure and thereafter relied upon the presumption of validity attendant upon the arbitration award in acting to frustrate the sale and enforce its boycott.

* It encouraged the arbitrator not to consider the issue of legality and made no reference to this potential defense in its *ex parte* application for a temporary restraining order.

On February 16, Vantage intervened and also filed unfair labor practice charges against the NMU and Commerce with the NLRB. On February 22, an order was signed vacating the temporary restraining order and permitting the sale on condition that a bond be posted in the amount of $278,000 by Commerce and Vantage covering pension contributions to the NMU, and upon the filing of a separate undertaking by Vantage ensuring that the NMU, if it ultimately succeeded in its action, be placed in the same position it would have been if the restraining order were continued. Vantage filed the required undertaking the same day.

However, the next day, February 23, before the bond could be posted, the NMU persuaded a different District Court Judge to restore the temporary restraining order during oral argument on its petition to confirm the arbitration award. On March 2, a decision was issued granting a preliminary injunction against the sale of the S.S. BARBARA to Vantage or any other purchaser without compliance with the restraint-on-transfer clause and, on March 4, an order to that effect was signed. *National Maritime Union* v. *Commerce Tankers Corp.*, 325 F. Supp. 360 (S.D.N.Y. 1971). During this period the NLRB had not yet acted on the charges filed by Vantage.

The SoCal charter, which was due to expire on March 5, 1971, was extended on a day-to-day basis while Vantage attempted to devise some alternative means of fulfilling the charter. All attempts to do so were unsuccessful. On March 11, 1971, SoCal cancelled the charter due to "union problems". Shortly thereafter, Commerce had an opportunity to sell the S.S. BARBARA foreign, pleaded with the NMU to be allowed to do so, and was rebuffed.*

After much urging by Vantage to expedite the investigation of charges filed two months earlier, the Regional Director of the NLRB issued a complaint against the NMU on May 24, 1971, charging that the restraint-on-transfer clause violated §8(e) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §158(e), and stating his intention to seek an injunction against application of the restraint-on-transfer clause. On June 22, 1971, Judge Thomas F. Croake of the United States District Court for the Southern District of New York issued a decision denying the NLRB's request for an injunction but indicating an intention to vacate the preliminary injunction issued by Judge Frankel because of its "severe and avoidable" economic hardship upon the companies. On reargument, however, the NMU prevented the lifting of the injunction on the basis of a procedural technicality—the District Court's lack of jurisdiction to modify an interlocutory order as to which an appeal was pending. *McLeod* v. *National Maritime Union*, 329 F. Supp. 151 (S.D.N.Y. 1971).

On appeal, the Court of Appeals for the Second Circuit, reversed the rulings of the district courts, vacated the NMU injunction and granted the NLRB 10(l) injunction. ***National Maritime Union*** v. *Commerce Tankers Corp. and* ***Vantage Steamship Corp.***; *McLeod* v. *National Maritime*

* In August, Commerce had another opportunity to sell the S.S. BARBARA foreign, if the NMU would have given assurances to the buyer that it would not attempt to enforce its labor contract on the buyer; the NMU refused to give these assurances and the sale was also lost.

Union, 457 F. 2d 1127 (2nd Cir. 1972). Eventually, the NLRB completed its unfair labor practice proceedings and found that the restraint-on-transfer clause violated Section 8(e) of the NLRA. *Commerce Tankers Corp.*, 196 NLRB 1150 (1972). The Second Circuit enforced the Board's order and this Court denied *certiorari*. *NLRB* v. *National Maritime Union*, 486 F.2d 907 (2nd Cir. 1973), *cert. denied*, 416 U.S. 970 (1974).*

Ultimately, the contract rights as between Commerce and Vantage were resolved in commercial arbitration, with Vantage bearing the loss. The ship was finally sold by Commerce to a third party in May 1972 for $700,000.00.

3. The Proceedings Below

In the District Court, Vantage and Commerce, relying on anti-trust, secondary boycott and wrongful injunction theories, each sought damages resulting from the NMU's enforcement of its unlawful clause to frustrate their business transaction. After trial, Hon. Thomas P. Griesa declined to consider the claim of anti-trust violation based upon a group boycott because he found that even if the clause were illegal, such illegality was not the proximate cause of the injuries to Vantage and Commerce. Citing no authority, he found, instead, that the proximate cause of the frustra-

* In 1976, well over *two years* after the Second Circuit declared the restraint-on-transfer clause illegal under Section 8(e), and while the district court below was considering the same "good faith" claims which the NMU offers here, the NMU once again invoked the restraint-on-transfer clause to prevent the proposed sale of a tanker by one of its contracted companies. *National Maritime Union and Seafarers International Union and Mathiasen's Tankers Industries, Inc.*, Case No. 2-CE-90, NLRB, Region 2 (1976).

tion of the sale was the District Court's erroneous preliminary injunction and, therefore, the anti-trust claim was dismissed (Petition, App. D, p. 61a).

On appeal, the Second Circuit reversed the District Court's dismissal of the anti-trust claim and remanded the cause for consideration by the lower court, holding that "the execution of the disputed clause and the NMU's determined efforts to enforce it were the proximate cause of injury to appellants . . ." (*id.*, App. A, p. 14a). The Court went on to discount the NMU's claim that all it did was "go to court" by holding that "a group boycott that is illegal under the antitrust laws can[not] be immunized from liability by a later lawsuit to enforce it" (*id.* at p. 13a). However, the court refused to itself decide, without prior findings from the district court, whether the restraint-on-transfer clause violated the anti-trust laws (*id.* at pp. 17a-18a).*

On application of the NMU, proceedings on remand in the District Court have been stayed pending resolution of this petition.

* Judge Lumbard, in dissent, concluded that the disputed clause *was* an anti-trust violation, and found error in the Court's refusal to make that determination (Petition, App. A, pp. 19a-24a).

ARGUMENT

I

The decision of the Court below does not conflict with prior decisions of this Court.

The decision of the Court below does not, as alleged by the NMU, conflict with *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965); and *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). Rather, it resolves an issue which was not before the Court in any of those cases—and resolves it in conformity with the principles enunciated therein.

The *Noerr* line of cases above-cited held that where the defendants conspire together for the sole purpose of influencing the executive, legislative or judicial branches of government, such conspiracies, regardless of anti-competitive motive, do not constitute violations of the anti-trust laws. Thus, in those cases, the objects of the allegedly offending conspiracies were to encourage the government to *create* an anti-competitive situation.

In the instant case, however, the NMU did not, as alleged, merely institute legal proceedings for the purpose of creating an anti-competitive situation by obtaining a judicial interpretation of its clause. On the contrary, the NMU set upon an entire course of conduct to implement and enforce its illegal restrictions—not by strike which would have been wholly ineffective under the circumstances of this case—but by the more coercive means of resorting to the

contractual procedure which it had, itself, established with the other parties to the boycott agreement. That contractual procedure, conducted before an individual selected by the boycotters, a procedure which permitted no testimony of witnesses, which lasted only twenty minutes, which refused to consider questions of legality, and which was established in order to enforce the boycott agreement, is not even procedurally the resort to the courts envisioned by *Noerr*. In addition, Vantage was neither a party to, nor represented at, this enforcement proceeding. Yet its effect was to frustrate the impending sale of the S.S. BARBARA and cause millions of dollars of damages to Vantage. That, indeed, was the purpose of the NMU's action. Unlike the "protected" activity in *Noerr*, this was not simply an attempt to test the law or influence legislation.

Likewise, the NMU's subsequent institution of legal proceedings to enforce the arbitration award is completely different from the activity in *Noerr*. Again, the NMU did not merely go to court for the purpose of utilizing judicial machinery to seek an interpretation of the extent of its legal rights under the restraint-on-transfer clause. Rather, it ruthlessly sought judicial sanction for the prohibition against the sale which it secured under its boycott agreement. The NMU's efforts were facilitated by the presumptions of regularity attaching to arbitration awards and it steadfastly insisted on diverting the Court's attention from even considering the illegality of the clause. Throughout the legal proceedings, the NMU refused to await a determination of the legality of the clause from the NLRB even upon Vantage's undertaking to make the NMU fully whole if its restrictions were unltimately found legal. In short, the NMU's object was to stop the sale, not merely to test

its rights or win a legal interpretation through the courts. In pursuing this object the NMU initiated a contractual proceeding wholly devoid of due process, and thereafter abused the judicial and administrative process. Such conduct was not condoned by *Noerr* and should not be condoned by this Court.

The language of *California Motor Transport, supra,* 404 U.S. 508, supports the Second Circuit's holding that the NMU's "determined efforts" to enforce its illegal clause is not exempted from liability under the Sherman Act:

> "Petitioners, of course, have the right of access to the agencies and courts to be heard . . . . That right, as indicated, is part of the right of petition protected by the First Amendment. Yet that does not necessarily give them immunity from the anti-trust laws.
>
> "It is well settled that First Amendment rights are not immunized from regulation when they are used as an integral part of conduct which violates a valid statute . . . ." 404 U.S. at 513-14. See also *Noerr, supra,* 365 U.S. at 136-37.

Thus, the holding of the Court below is fully consistent with prior decisions of this Court and, therefore, the instant petition for *certiorari* is without merit.

II

The decision of the Court below does not conflict with decisions of other circuits.

The NMU relies upon a recent decision of the Tenth Circuit Court of Appeals to demonstrate an alleged conflict among the circuits. See *Adolph Coors Co.* v. *A & S Wholesalers, Inc.,* F.2d , 1977-2 CCH Trade Cases

¶61,565 (1977).* Again, however, the NMU misconstrues this decision which is, we submit, consistent with the decision below, as well as the *Noerr-Pennington* doctrine.

In *Coors,* the brewer sought to impose its territorial restrictions upon a distributor which purchased its product for resale outside the permissible territory. It obtained a preliminary injunction enforcing these restrictions and, thereafter, the distributor raised two separate counterclaims: (1) arising solely from Coors' prosecution of its lawsuit against the distributor and (2) arising from Coors' allegedly illegal territorial restrictions. Ultimately, while the independent claim for damages arising from prosecution of the lawsuit was dismissed on the authority of *Noerr-Pennington,* the claim of anti-trust violation arising from the underlying territorial restrictions was tried before a jury and found not to be illegal.

Unlike the distributor in *Coors,* Vantage has never sought damages based solely on the NMU's initiation of legal proceedings. Thus, the dismissal of the distributor's claim arising *solely* from Coors' prosecution of the lawsuit is inapposite. And like the distributor in *Coors,* Vantage has claimed that the underlying restrictions violate the anti-trust laws—a claim which both the Second and Tenth Circuits recognize is entitled to consideration on the merits notwithstanding prior judicial enforcement of the allegedly illegal restrictions. That the Court in *Coors* ultimately found that the territorial restrictions were not violative of the anti-trust laws is, of course, without consequence. What is important is that just as the Tenth Circuit recognized

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* A copy of the decision in *Coors* is annexed to the Petition as Appendix E.

the distributor's right to test the legality of the territorial restrictions under the Sherman Act, the Second Circuit has similarly recognized Vantage's right to test the legality of the NMU's restraint-on-transfer clause under that same statute. If Vantage is correct that the NMU's restrictions were illegal (an issue which the Court below refused to decide, but which was resolved in Vantage's favor in Judge Lumbard's dissent), the NMU will be required to respond in damages as provided by law. The Tenth Circuit, of course, never reached this point because of the finding that Coors' restrictions were legal.

In sum, contrary to NMU's claim, the decision below, rather than conflicting with the decision in *Coors,* is wholly consistent therewith.

III

The decision of the Court below is correct on the merits.

The decision of the Court below is mandated by the plain language of Section 4 of the Clayton Act, 15 U.S.C. §15, which permits recovery for injuries occurring "by reason of" an anti-trust violation. The Court below simply applied the principle of proximate causation which arises directly from the language of the Act and has been long settled. See *Continental Ore Co.* v. *Union Carbide and Carbon Corp.,* 370 U.S. 690, 702 (1962); *Bigelow* v. *RKO Radio Pictures, Inc.,* 327 U.S. 251 (1946); *Billy Baxter, Inc.* v. *Coca-Cola Co.,* 431 F.2d 183 (2d Cir. 1970), *cert. denied,* 401 U.S. 923 (1971). Indeed, the NMU's petition for *certiorari* does not appear to contest the application of

those principles to this case. Rather, it relies on the *Noerr-Pennington* doctrine as a means of insulating it from liability and damages for its illegal group boycott. As the Court below correctly recognized, that doctrine does not now, and has never, stood for the proposition that an illegal group boycott may be immunized from liability by a conspirator's attempt to judicially enforce it (Petition, App. A, p. 13a).

Moreover, the conduct of the NMU, as described in detail above, can in no manner be viewed as merely a good faith attempt to ascertain and vindicate its legal rights. Under the peculiar circumstances of this case, the NMU's uncompromising resort to contractual and judicial injunctive machinery to enforce its illegal group boycott was as coercive as any strike, picketing, or other form of economic self-help. The Court below correctly declined to adopt the exception urged by the NMU—an exception which would swallow the rule if labor unions, or any co-conspirators, would be exempted from liability for their illegal acts merely because they used contractual and judicial machinery to implement them. Such result has not and, indeed, cannot be required under *Noerr-Pennington.*

Conclusion

For all of the foregoing reasons, the NMU's Petition for a Writ of Certiorari should be denied. If, however, this Court should grant the instant Petition, Vantage respectfully urges the Court to grants its previously filed Petition for a Writ of Certiorari in *Commerce Tankers Corp., et al.* v. *National Maritime Union*, Docket No. 77-376.

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Respectfully submitted,

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